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IN THE

Supreme Court of the United States

October Term, 1980

NO. _____

RONALD CECIL BARKER,

Petitioner,

VS.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

I. WHETHER THE GOVERNMENT ACTIVITY IN THIS CASE, INCLUDING THE USE OF CRIMINAL PROFITEERS, CONSTITUTES THE TYPE OF OUTRAGEOUS CONDUCT ON THE PART OF LAW ENFORCEMENT WHICH VIOLATES DUE PROCESS AND THUS PROHIBITS THE PROSECUTION OF DEFENDANTS CAUGHT UP IN THAT GOVERNMENT CONDUCT.

II. WHETHER PETITIONER WAS DENIED DUE PROCESS OF LAW AND HIS RIGHTS TO CONFRONTATION AND COMPULSORY PROCESS BY UNDUE RESTRICTIONS PLACED ON DEFENSE CROSS-EXAMINATION IN THAT:

(a) KEY GOVERNMENT WITNESSES WERE ALLOWED TO AVOID DEFENSE CROSS-EXAMINATION RELEVANT TO THEIR DIRECT TESTIMONY AND TO POSSIBLE BIAS OR ULTERIOR MOTIVE ON THEIR PART.

(b) THE TRIAL JUDGE RESTRICTED DEFENSE QUESTIONING AIMED AT SHOWING BIAS ON THE PART OF A KEY GOVERNMENT WITNESS UNDER THE RATIONALE OF PROTECTING ONGOING GOVERNMENT INVESTIGATIONS.

III. WHETHER THE PETITIONER WAS DENIED HIS CONSTITUTIONAL PRIVILEGES UNDER ARTICLE III, SECTION 2, CLAUSE 3 AND UNDER THE SIXTH AMENDMENT TO BE TRIED IN THE STATE AND DISTRICT WHEREIN THE CRIME WITH WHICH HE WAS CHARGED WAS COMMITTED WHEN HE WAS PROSECUTED IN ALABAMA FOR IMPORTATION OF MARIJUANA BUT THE

MARIJUANA CAME INTO THE UNITED STATES IN MISSISSIPPI.

PARTIES TO PROCEEDINGS BELOW

The following is a list of all parties to the proceeding in the Fifth Circuit Court of Appeals: Billy W. Gray, Lee Andrew Fennell, Ronald Cecil Barker, and Vance C. Dyar, Defendants-Appellants; and the United States of America, Plaintiff-Appellee.

PREFATORY STATEMENT

The record of this case is comprised of nine (9) volumes, numbered in Arabic numerals. Two volumes are labelled "Record on Appeal" and all citations to those volumes will be noted as the letter "R" followed by the volume number and page reference, e.g., "R. 1:4". One volume is labelled "1st Supplemental Record on Appeal" and all citations to this volume will be noted as the letter "S" followed by the page number, e.g., "S. 12". The remaining six volumes containing the trial transcript are labelled "2nd Supplemental Record on Appeal" and all citations to these volumes will be noted as the letter "V" followed by the volume number and page reference.

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RONALD CECIL BARKER,

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The Petitioner, RONALD CECIL BARKER, respectfully asks that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

Petitioner was convicted on February 1, 1979 in the United States District Court for the Southern District of Alabama, without opinion. On September 26, 1980, the United States Court of Appeals for the Fifth Circuit rendered a decision affirming in part and reversing in part the conviction of Petitioner in an opinion appearing

at 626 F.2d 494. (See Appendix, p. A-1) On October 10, 1980, Petitioner filed a timely Petition for Panel Rehearing which was denied by the Court by Order dated October 23, 1980. (See Appendix, p. A-21)

JURISDICTION

Jurisdiction of this appeal is grounded in a September 26, 1980, decision of the United States Court of Appeals for the Fifth Circuit affirming the judgment of the United States District Court for the Southern District of Alabama. The statutory provision conferring jurisdiction for this appeal is 28 U.S.C. Section 1254.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

This case involves the Fifth and Sixth Amendments and Article III, Section 2, Clause 3 of the United States Constitution which provide in pertinent part as follows:
Amendment V:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or idictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment VI:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have

been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

Article III, Section 2, Clause 3:

"The trial of all crimes, . . . shall be by Jury; and such Trial shall be held in the state where the said crimes shall have been committed . . ."

The case also involves 18 U.S.C. §3237, and 21 U.S.C. §952(a) which provide as follows:

18 U.S.C. §3237(a):

Except as otherwise expressly provided by enactment of Congress, any offense against the United States begun in one district and completed in another, or committed in more than one district, may be inquired of and prosecuted in any district in which such offense was begun, continued or completed.

21 U.S.C. §952(a):

It shall be unlawful . . . to import into the United States from any place outside thereof, any controlled substance in Schedule I or II of Subchapter I of this Chapter, or any narcotic drug in Schedule III, IV or V of Subchapter I of this Chapter, . . .

STATEMENT OF THE CASE

(i) Proceedings Below.

On August 11, 1978, Ronald Cecil Barker and six other individuals were charged in a four court indictment with violating the following provisions of the Drug Abuse Prevention and Control Act: 21 U.S.C. §841(a)(1)—distribution and possession with intent to distribute marijuana; 21 U.S.C. §846—conspiracy to distribute and to possess

with intent to distribute marijuana; 21 U.S.C. §952(a) – importation of marijuana; and 21 U.S.C. §963 – conspiracy to import marijuana. Petitioner Barker plead not guilty on August 28, 1978.

Petitioner Barker and the other defendants proceeded to trial on January 22, 1979, having filed motions to suppress and motions to dismiss for lack of venue and for government misconduct. Each of these motions was denied (See Appendix, p. A-23) and Petitioner was convicted of each count of the indictment on February 1, 1979. Petitioner was sentenced on February 20, 1979.

A Notice of Appeal was timely filed and a brief was submitted in support of said Notice. On September 26, 1980, the Fifth Circuit Court of Appeals affirmed Petitioner's conviction in *United States v. Gray, et al*, 626 F.2d 494 (1980). A timely Petition for Rehearing was denied on October 23, 1980.

(ii) Facts.

Government Misconduct

The indictment and resulting convictions in this case were triggered by the discovery of approximately 12,000 pounds of marijuana in the back of a tractor-trailer truck near Mobile, Alabama. A detailed account of precisely how and through what actions the marijuana came to be in that trailer is essential to the presentation of Petitioner's government misconduct question. Petitioner therefore asks the Court's indulgence in the rather lengthy recitation of facts necessary to adequately present this issue.

The story of how the marijuana came to be in that trailer early on the morning of July 24, 1978, actually began several months earlier.

Haas and Conn Become a Team

In May of 1978, Edward Conn and Mel Anderson entered into a partnership agreement for the purpose of being the fixed based operators (V. 4:1036) of Stennis International Airfield in Bay St. Louis, Mississippi (V. 2:411). Conn, one of the government's key witnesses at trial, had previously been indicted in Arkansas on criminal mischief charges (V. 3:656) involving the destruction of a helicopter for purposes of insurance fraud. (V. 3:688) Shortly thereafter, Conn had cooperated with the Little Rock Drug Enforcement Administration (the "DEA" (V. 5:1305) and in return had received help from the DEA in regard to the charges pending against him. (V. 3:717) At trial Conn testified that the DEA asistance had been instrumental in his receiving a recommendation of a suspended sentence on the Arkansas charge. (V. 3:718) Around Easter, 1978, Conn had also been involved in a scheme involving 8,000 pounds of marijuana in Thomasville, Georgia. (V. 3:690) Although Conn had not yet been indicted on the Thomasville case when he moved to Mississippi, he had good reason to believe that he would be, since he had known from the day after Easter that three parties from the Thomasville operation were talking to law enforcement authorities. (V. 3:740)

In Mississippi, Conn made the acquaintance of the other key witness for the government at trial, Joseph Haas, a self described "airport bum" (V. 3:836), and pilot for TACA International Airlines. For 9 or 10 years Haas had worked as a smuggler and informant for the DEA. (V. 3:841) Haas had been suspicious of Conn when he first saw him because he perceived Conn to be "flashy" and on that basis had checked him out with the DEA. (V. 3:843) Following that, the two became acquainted

and discussed the smuggling business (V. 3:842) with Haas telling Conn that he had previously worked for the DEA (V. 3:845) on a number of cases over the years and that he had made lots of money. (V. 3:701) This included $47,000 which Haas testified he had received from an operation in 1976. (V. 6:1705) About one or two weeks after the two made their acquaintance, Haas appeared on behalf of Conn before the local airport commission in regard to problems Conn was having in obtaining the position as fixed land operator because of his criminal background. (V. 3:699)

Haas and Conn Set Up a Deal

On June 26, 1978, Haas and Conn flew to Cape Girardeau, Missouri, in order to attend an airplane auction. (V. 3:837) There they met Bill Gray who had known Conn for at least 4 years (V. 5:1203), but who had never met Haas. (V. 5:1204) What happened next was disputed at trial. Haas and Conn contended that Gray, who had never discussed smuggling with Conn (V. 3:659), approached Haas about the possibility of smuggling either heroin or cocaine in a "suitcase deal". (V. 3:840) On the other hand, Gray testified that it was Haas who approached him, and that it was Haas who suggested putting a certain airplane to use in the smuggling business, (V. 5:1207) asking if Gray knew anyone with enough money to back a "suitcase deal". (V. 5:1210) Gray was told by Haas that he could become extremely wealthy and make hundreds of thousands of dollars. (V. 5:1234) In support of this Haas described previous drug runs he had made to Stennis Airfield (V. 5:1208) and how he had killed a man who had once attempted to stop such a drug run. (V. 5:1209) Conn would verify what Haas said during these conversations. (V. 5:1208) The following morning, Haas approached Gray and said, "I told you too much

about our operation and I think you should try harder to find someone to use one of our aircraft." (V. 5:1212)

Following the auction, Conn and Haas returned to the Bay St. Louis area, while Gray moved to Mobile. (V. 5:1242) Further discussions took place between Conn and Gray, with differing testimony as to who contacted whom. Gray testified at trial that Conn called him four or five times each day, after the conversation, in order to find out if someone had been found who could make use of Haas' plane. (V. 5:1247) At one point Conn made a pointed reference to Gray concerning the man Haas had allegedly killed. (V. 5:1219) The obvious meaning of this statement did not escape Gray. (V. 5:1219)

Following the auction Conn also had discussions with Haas and DEA agents Martin and Gorman. (V. 3:784) Conn, the government's witness, testified that at these meetings, he was promised immunity from prosecution in Thomasville, if he would assist in the case at hand. (V. 3:684, V. 3:784) DEA agents, of course, lack the power to make such a deal. (V. 5:1385) Haas also sought to impress Conn with his authority by telling him that he was with the CIA. (V. 3:801) Conn was apparantly impressed by all this, as he testified at trial that he became involved in the deal in question because of fear of conviction in Thomasville. (V. 3:732) No evidence was introduced by the government showing that Conn had any discussions concerning immunity with authorities in Thomasville.

Around the 5th day of July, 1978, Gray met an old friend in Mobile named Vance Dyar whom he had known for seven to nine years. (V. 5:1249) During this time he continued to receive phone calls from Conn, inquiring whether he had found someone to use Haas' plane for

purposes of smuggling. (V. 5:1247) Dyar expressed an interest in such a plan and Gray and Dyar went to visit Conn around the 10th or 12th of July. (V. 5:1248) By this time, any smuggling operation was to involve marijuana. The first deal proposed at this meeting was to involve Conn's airplane, a Convair, which Conn offered to lease for $50,000. (V. 3:705) Haas offered to supply a crew for the airplane for $40.00 per pound of marijuana with $100,000 up front. (V. 3:851) Since the amount of marijuana contemplated at this time was 6,000 pounds, Haas sought to make $240,000. (V. 3:708) As was shown later, Haas and Conn from the outset intended to make a substantial profit on the whole operation with DEA approval, as Haas had already made in previous cases, and thus, both had a substantial interest in insuring that marijuana was actually imported.

Haas and Mel Anderson went to Ocala, Florida, and flew the Convair back to Stennis. (V. 3:855) Repairs in the amount of $7,000 were made on the plane. (V. 3:799) However, the plane was not put into use for the purpose intended as a DEA agent named Bland contacted Haas and told him to call off the deal involving Conn's Convair, since it was a "hot" plane. (V. 4:988) Apparently, there was concern that other law enforcement agencies would foil the scheme. At this juncture, discussions arose concerning the possible use of a DC-4, which at the time was located in Palm Beach, Florida (V. 3:855) and was in a state of disrepair. (V. 5:1284) Reference to this plane was made by a Richard Brown, an unapprehended co-defendant. (V. 5:1282) Upon finding out about the DC-4, Conn asked Brown about the extent of the damage to the plane. (V. 5:1284) Conn then stated that he had the facilities to repair the aircraft (V. 5:1285), and that he, Conn, would get a crew to go get the plane. (V. 5:1286) Subsequently,

the DC-4 was brought to Stennis, where repair work was done on the plane by Haas and TACA International Airlines, the company with whom Haas was employed. (V. 3:794)

Negotiations meanwhile continued. Defendants Gray, Barker and Dyar, as well as Brown, met with Conn and Haas near Stennis. (V. 5:1278) A further meeting was held between Gray, Barker, Dyar and Brown and Haas in New Orleans around July 20th. (V. 5:1296) One final meeting between all of the above was held in Mobile. (V. 5:1315) As a result of these negotiations, it was determined that Conn and Haas were to get a total of $150,000. (V. 4:943) The arrangement called for Conn to get $25,000 for supplying the airstrip (V. 4:942) while Haas was to get the remaining $125,000 to divide among himself and the crew he provided. (V. 4:942) As each pilot was to receive $20,000, Haas was to be left with $85,000. (V. 4:943)

Besides repairing the plane and attending meetings during this period, Haas had other activities to keep him busy. At one point, Conn became worried about that "small fry" like Gray would be caught (V. 4:922) and Haas found it necessary to "pump up" Conn. (V. 4:922) Part of the procedure he used to do this was to tell him that he could make more than a few bucks. (V. 4:922) Haas was also responsible for recruiting the crew for the flight. (V. 4:940) One of the pilots whom Haas recruited was a Walter Anderson who eventually received $15,000 for the trip in question. (V. 4:1098) At the trial, Anderson testified that at no time did he ever have to account to the DEA for the money he received nor did he file a voucher with them. (V. 4:1103) Anderson further testified that he had "reinvested" $15,000 he had received in another operation. (V. 4:1104)

The other pilot recruited by Haas was Thomas Brignack, who was also employed by TACA International Airlines, the same company which employed Haas. (V. 4:1061) Haas had testified that Brignack had flown a previous operation on his behalf and on behalf of the DEA in 1976 (V. 4:901), but that he and Brignack had not flown a mission in 1972 which landed in Texas. (V. 4:932) Brignack, however, testified that he had flown to Colombia with Haas (V. 4:1065) in 1972 for purposes of picking up marijuana. (V. 4:1066) This testimony was corroborated by the testimony of John Hesmer who interviewed Brignack in late 1978 (V. 4:1165) and who testified that Brignack told him that he had flown to Colombia with Haas in 1972 (V. 4:1167) and that he was paid $7,000 for his services. (V. 4:1167) No testimony was offered by Brignack that the 1972 flight was DEA sponsored. (V. 4:1167) Brignack further testified that he did not know if the trip in question was a DEA operation as neither Conn nor Haas had informed him of such. (V. 4:1071) For his services, Brignack received $13,800. (V. 4:1071) At no time did he report this money to the DEA, nor did he file any vouchers with the DEA. (V. 4:1078)

Prior to the actual trip, Haas received $40,000 from alleged co-conspirator Brown. (V. 3:865) Of this amount he claimed he gave $15,000 to each pilot and kept $10,000 for himself. (V. 3:866) Haas was also told by Brown that he would receive an additional $60,000 to $70,000 and the DC-4 aircraft. (V. 3:867)

The trip went forward as planned. On the flight were the two pilots and Brown. (V. 3:867) Neither Conn, nor Haas made the trip to Colombia. The plane proceeded to Colombia (V. 4:1062) where it was loaded with contraband. (V. 4:1086) The plane returned to the United

States and landed at Stennis International Airport, in Hancock County, Mississippi. (V. 4:1088) During the time that the plane was unloaded, Haas circled above with a DEA agent in his private plane. (V. 3:879) The trucks left the airfield and were eventually apprehended by law enforcement authorities.

The Payoff

After landing, Haas found that an additional $30,000 had been placed in the trunk of his car. (V. 4:945) He, however, did not share this information with the DEA. When asked by DEA Agent Thompson, a week later whether he had received any of the additional $60,000 he was supposed to get, he replied that he had not. (V. 4:1186) With the original $10,000 Haas received a total of $40,000. (V. 4:944) At trial, Haas testified that he had expenses of $3,000 to $4,000. (V. 4:950) Thus, he received a profit of $36,000 to $37,000. (V. 4:951) This apparently was insufficient for Haas, who complained that he did not get what he expected, (V. 3:714, V. 4:953) and who accused people of taking things out of his trunk. (V. 4:953) In one last attempt to get money, Haas testified that he intended to put in a claim for the DC-4 along with Conn, once customs was ready to disburse it. (V. 4:949) Haas estimated the value of the plane to be from $70,000 to $100,000. (V. 4:947) At the time of trial (1/79), Haas had not filed a 1979 income tax form reporting the income from the operation in question, nor had he filed any quarterly withholding reports with the IRS. (V. 6:1709) He did, however, purchase a new Cadillac (V. 4:991) after completion of the importation he and Conn had made possible by repairing the aircraft, supplying the pilots and providing an airfield.

For his part in the episode, Conn received $25,000. (V. 3:712) Conn at no time ever filed any vouchers or paperwork with the DEA, and the DEA never asked him for any of the money he received. (V. 3:711) Conn further stated at trial, that he hoped he would not have to pay taxes on the amount received. (V. 3:712) Like Haas, he also intended to file a claim for the DC-4. (V. 4:949) Conn also received $5,000 for expense which he showed to Agent Thompson. (V. 3:802) Thompson, however, did not ask for an itemization of expenses. (V. 3:802) Conn used $20,000 of the $25,000 to bribe a Colombian official in order to assist a pilot from a subsequent operation. (V. 3:721) This was done not only with DEA knowledge but with implied DEA approval, sanction being provided by Agent R. A. Thompson. (V. 3:791) Both Conn and Haas admitted that for them to get their money, it was necessary that the deal go forward. (V. 3:715, V. 4:903)

DEA Agent Charles Park testified that government agents had a right to seize money involved in drug deals on behalf of the United States Treasury. (V. 4:1006) However, no money was turned over to the Treasury in this case, because no money was seized. (V. 4:1009) Instead, it was in the pockets of Conn, Haas and the pilots. DEA Agent Thompson testified that he was aware from the outset of these payments. (V. 4:1182) Nonetheless, no money was seized, despite the fact that it was required procedure of the DEA to seize money and account for it. (V. 4:1188)

In October, 1978, Agent Thompson went to Thomasville on behalf of Conn. (V. 5:1366) His appearance was to no avail as the Sheriff of Hancock County executed an arrest warrant against Conn from Thomasville on October 25, 1978. At that time, Haas (the self-described air-

port bum, and employee of TACA International Airlines) contacted the Sheriff, said he was with the DEA and that he wanted Conn released to him, so that he could fly Conn to Georgia. (V. 4:1126) This request was denied, perhaps because the Sheriff testified that he would not believe Haas under oath. (V. 4:1121) Haas himself admitted that he was a terrific liar. (V. 4:993)

New Business

Haas' and Conn's activities did not end with the apprehension of the defendants. After defendant Gray had been indicted, Conn contacted him by telephone. (V. 3:661) Conn proposed to Gray that he become involved in another smuggling operation backed by the DEA. (V. 3:661) Conn further told Gray that if he would fly the plane, nothing would happen to him and that he might receive up to $50,000 profit. (V. 3:661) In a phone conversation with Gray, Conn said, "And I wouldn't even do it all myself if anybody was going to get busted on it. That's how I feel. Because I done, you know, I paid my debt and it was a bummer and, you know, and I feel bad about it. I really do, because it wasn't supposed to be like that at all and the only reason I see it, because they explained it to me wrong." (V. 3:671) In that conversation Conn also told Gray that he was a CIA agent and that Haas was also a CIA agent, who "works with the DEA just for the money." (V. 3:805) Conn also testified that around October 23, 1978, he had returned from a trip to Colombia. (V. 3:673) The trial judge, however, ruled that since this activity was subsequent and ongoing, further testimony could not be elicited. (V. 3:676)

Haas in the meantime had contacted Mel Anderson in late August or early September of 1978 about becoming

a DEA informant. (V. 3:963) Anderson also had troubles in Thomasville (V. 3:963), but did not want to be involved in further smuggling operations, whether sponsored by the DEA or not. Eventually, Anderson's feelings on this matter led to the dissolution of his partnership with Conn. (V. 3:720) Haas, however, was insistent in his wish for Anderson to become an informant (V. 3:964). He needed the airfield to continue his extremely lucrative business. Accordingly, he contacted Anderson's wife, telling her to have her husband cooperate, or else he was in big trouble. (V. 3:964) Haas further indicated to Mrs. Anderson that Anderson could make up to $200,000 if he would cooperate. (V. 4:1048) The alternative, Mrs. Anderson was informed, would be jail. (V. 4:1049) Succumbing to this pressure, Anderson agreed to fly to Colombia on a flight arranged by Haas. (V. 4:968) On that trip, Anderson was purportedly killed in an airplane crash. (V. 4:1052) Haas apparently did not consider this news to be of sufficient moment to inform Mrs. Anderson of it, and it was only after persistent efforts by Mrs. Anderson that she was able to determine that her husband had been killed. (V. 4:1052) When questioned about Anderson's remains, Conn replied that if brought back, they would not fill up a teacup. (V. 4:1053)

Petitioner Barker filed a motion to dismiss or in the alternative to suppress evidence because of the government's misconduct in arranging for the importation of marijuana through profiteers such as Haas and Conn. This motion was denied. (Appendix, p. A-23)

Restrictions on Defense Examination

At the trial, still other problems arose. The judge refused to allow a thorough cross-examination of witnesses Conn and Beck after they invoked the Fifth Amendment.

(V. 3:684, V. 4:1151) The judge further did not allow the defense attorneys to go into subsequent activities of the government agents and informants involved. (V. 6:1687)

The trial judge disallowed questions on defense cross-examination directed at the government's key witness, Ed Conn, several times on the grounds of Fifth Amendment privilege, although Mr. Conn did not himself invoke that privilege. On three occasions (V. 2:495, V. 2:523-24, V. 2:542-45), the denial of the defense questions resulted from objections made by the prosecutor which the judge sustained with his own interjection of the Fifth Amendment as the grounds. Several other questions were disallowed as a result of objections by Conn's attorney, Mr. Ludwig. (V. 3:685-86; V. 3:691-93; V. 3:740-51). This practice of allowing Mr. Ludwig to merely object and then to sustain his objection instead of having the witness actually plead the Fifth Amendment in response to those questions was objected to by the defense.

The defense questions which were not allowed to be asked of Conn on Fifth Amendment grounds sought for the most part to establish what role the DEA had in the so-called "Thomasville operation" (another drug operation in which Conn was involved prior to the operation in this case); and, rewards or promises Conn received in regard to that operation. (V. 2:495, 542-45; V. 3:685-86; 691-93; 740-51) Questions were also disallowed concerning an operation in which Conn participated after the Stennis deal. (V. 3:523-24) Similarly, another witness, Wayne Beck, was allowed to take the Fifth Amendment with regard to defense questions about the same subsequent operation in South America in which Mel Ander-

son, Conn's business partner, was killed, and about the DEA's possible involvement in that operation.

During both the *James* hearing on co-conspirator hearsay and in open court the trial judge refused to allow the defense to question government witness Conn as to any involvement he had with the DEA subsequent to the Stennis operation involved in this case. First, the judge refused to allow the defense to inquire as to how many other DEA operations Conn had been involved in after Stennis. (V. 3:500-01, 546-47) Then he disallowed the question of whether Conn had made any money as a result of DEA operations since Stennis. (V. 3:502-03) Later, the judge disallowed questions about Conn's involvement in a particular DEA operation in South America after the operation in this case. (V. 3:674-75) The basis of the judge's restriction of cross-examination as to these subsequent matters was that such questions might jeopardize ongoing investigations of the government.

Venue

As mentioned earlier, prior to trial Petitioner filed a Motion to Dismiss for Lack of Venue because Stennis International Airport where the plane carrying the marijuana landed and the marijuana was unloaded is located in Mississippi and is thus outside the jurisdiction of the Southern District of Alabama. After the marijuana was unloaded from the plane, it was transported by truck into Alabama. It was in Alabama that the truck, its contents and the alleged drivers, were taken into custody. The trial court ruled that venue was proper in Alabama and the Fifth Circuit agreed holding that pursuant to 18 U.S.C. §3237 and *United States v. Godwin*, 546 F.2d 145 (5th Cir. 1977), the offense of importation is a "continuing

one" and, therefore, that each jurisdiction into or through which the marijuana was transported was an appropriate forum for trial.

REASONS FOR GRANTING THE WRIT

I. DUE TO THE NATURE AND EXTENT OF THE GOVERNMENT ACTIVITY INVOLVED, THIS CASE PRESENTS A PARTICULARLY APPROPRIATE VEHICLE FOR THIS COURT TO AT LAST PROVIDE DIRECTION TO THE LOWER FEDERAL COURTS ON THE CRITICAL QUESTION OF WHEN CONDUCT OF LAW ENFORCEMENT OVERSTEPS THE CONSTITUTIONAL BOUNDARY OF DUE PROCESS SO AS TO BAR THE PROSECUTION OF DEFENDANTS APPREHENDED AS A RESULT OF THAT CONDUCT.

This Court has acknowledged in the recent past that there may in fact be instances of law enforcement conduct outrageous enough to violate notions of due process which require the dismissal of charges filed against those defendants who are caught up in that conduct.

In *United States v. Russell*, 411 U.S. 423, 36 L.Ed.2d 366, 93 S.Ct. 1637 (1973) the Court, in a 5-4 decision denied a defendant's plea for relief on such grounds, however, in so doing Mr. Justice Rehnquist, writing for the majority noted:

> "[W]e may some day be presented with a situation in which the conduct of law enforcement agents is so outrageous that due process principles would absolutely bar the government from invoking judicial process to obtain conviction . . ." *Russell*, *supra* at 431-32.

This position was strengthened in *Hampton v. United States*, 425 U.S. 484, 48 L.Ed.2d 113, 96 S.Ct. 1646 (1976)

when 5 of 8 justices not only took the position that outrageous police conduct could violate due process but further that such outrageous government misconduct could result in the reversal of a conviction even if it was found that the defendant was predisposed to commit the crime.

In both *Russell* and *Hampton*, it was by the barest of majorities that this Court decided that the government conduct and participation was *not* sufficiently outrageous as to justify reversal. In making those decisions the Court noted in *Russell, supra*, that the illegal scheme in question was already in existence and operating before any governmental participation. Furthermore, the Court noted that at no time did the government agent violate any law. In *Hampton v. United States, supra*, the Court found that prior to government involvement, there was ongoing drug traffic, and thus the scheme was not the creative activity of the government. It also noted as in *Russell*, that the government had supplied only one item to the defendants in each of the cases.

The problem is that this Court has yet to provide any guidance as to what circumstances or activities *do* constitute constitutionally objectionable government behavior. As a result the various circuit courts have been left to grope for their own separate standards for determining what conduct by law enforcement violates the Constitution and what does not.

The case at hand exhibits numerous and pervasive forms of government overreaching. Thus the case presents an opportune time for the Court to take certiorari on this issue and to settle some of the confusion which has developed around this issue by establishing some framework within which the lower courts may work.

The various grounds relied on in *Hampton* and *Russell, supra,* for denying reversal have no relevancy to this case. Here, no evidence was introduced to show that the scheme in question was in existence prior to the Cape Giraudeau auction which was attended by two government agents and one defendant. (V. 3:839, V. 5:1203) Thus, although prosecution and defense accounts of who approached whom at the auction differ, it is undisputed that both Haas and Conn, acting on behalf of law enforcement authorities, were there at the origination of the scheme.

Furthermore, the evidence indicates that the government through its agents supplied more than one item necessary for the success of the scheme. The prosecution itself admitted that they provided the airstrip (V. 4:942), the airplane crew (V. 4:940), and the mechanical expertise and repair facilities necessary to put the DC-4 in working condition so that the trip could go forward. (V. 3:794)

There is further evidence that during the course of the activities, the government committed illegal actions. Prosecution witness Conn testified that he paid a bribe to Colombian officials (V. 3:721) with the sanction of the DEA. (V. 3:790) Such activity is clearly illegal as shown by 18 U.S.C. §201. Furthermore there is evidence that DEA agents committed fraud when they over represented their abilities to obtain immunity to Conn. This was done, of course, to gain Conn's cooperation. (V. 3:684, V. 3:784) Conn himself later acting on behalf of the government, attempted to use such illegal and outrageous tactics on defendant Bill Gray, in order to elicit Gray's cooperation. (V. 3:671) Finally, the DEA agents did not see fit to seize the money involved in the deal on behalf of the U. S. Treasury, (V. 4:1006), despite the fact that they were aware that Conn, Haas and the two pilots had

received money. (V. 4:1182) Testimony from a DEA agent (V. 4:1188) noted that this is contrary to the custom and procedure of the DEA.

Of more import is the question of whether or not the scheme in this case was the creative activity of the government and whether or not government agents engineered the scheme from start to finish. The government would have us believe that its agents were innocent bystanders to a nefarious drug scheme. The testimony and facts received at trial, even when viewed in the light most favorable to the government, suggest otherwise.

Consider that Haas, an informant for the DEA (V. 3:841), made the acquaintance of Conn after he had checked out Conn with the DEA (V. 3:843) and determined that Conn faced difficulties in Thomasville, Georgia, on drug charges. (V. 3:690) There is no doubt that Conn was aware of the problems he faced. (V. 3:740) Subsequent to their introduction, but prior to the Cape Giraudeau auction, Haas revealed to Conn that he worked for the DEA. (V. 3:845) The obvious implication of this is that Haas sought to recruit Conn to work for the DEA in return for DEA help on Conn's Thomasville charges. Thus, it is clear that the DEA was involved at an early date, incredibly enough before any potential defendants had been "found".

It was precisely for the purpose of locating prospective defendants that Conn and Haas attended the Cape Giraudeau auction. There they found Bill Gray. The government in their protestations of innocence would have us believe that Gray, who had known Conn for at least four years (V. 5:1203) and who had never discussed smuggling with him (V. 3:659), approached Haas, a man whom he had never met before (V. 5:1204) about a drug deal in-

volving cocaine or heroin. (V. 3:840) No indication is given by the government as to why Haas had been so singled out by Gray. Instead, we are asked to believe that this was merely a lucky coincidence for the government.

Further negotiations between Haas and Conn and the defendants bear out the theory that the scheme was the creative activity of the government. As noted above, the government agents provided the airstrip, the flight crew and the expertise to put the plane eventually used in working order. Evidence also showed that the government attempted to supply an airplane for the scheme. (V. 3:705) Indeed, defendant Gray noted that Haas in their first meeting continually referred to the availability of a certain plane of his and his need to put the plane "to work". (V. 5:1207) Ultimately, however, the government plane, the Convair, could not be used because it was too "hot". (V. 4:988) Why this plane was so designated by the government was never adequately explained. Apparently, the DEA feared that other law enforcement agencies would foil their game.

The unavailability of the Government plane did not stymie the scheme however. When the Government became aware that the defendants had access to a DC-4 in disrepair, in Palm Beach, Florida, they proceeded to dispatch a crew to get the plane. (V. 5:1286) Upon the return of the plane to Stennis, they then provided the expertise and facilities to place the plane in good operating order. (V. 3:794) A pattern was thus established. Each time a potential hurdle arose which might have prevented the scheme in question, the government by and through its agents, provided what was necessary so that the scheme might go forward.

A key question to be answered here is why would the

government through its agents behave in such a manner. This question is of course vital in determining government misconduct. *Hampton v. United States, supra.* The answer here is simple. Haas, the originator and mastermind of the scheme was involved out of simple greed. His first demand to the defendants for providing a flight crew was for $240,000. (V. 3:708) This priced him out of the market and would have also provided an impediment to the scheme's going forward. (There was no evidence introduced which indicated that the defendants would have been able to find another flight crew.) Accordingly, he consented to receive a "mere" $125,000 for providing the crew. Out of this amount he was to pay $20,000 to each pilot, which would leave him with $85,000. (V. 4:943)

Haas ultimately received $40,000 (V. 4:951) for the service. Conn received $25,000 (V. 4:942), while the two pilots got $15,000 (V. 4:1104) and $13,000 (V. 4:1071). Furthermore, a review of the circumstances in the case clearly indicates that it would be correct to call the attitude of these government agents laissez-faire. For example, both Haas and Conn admitted that it was necessary for the deal to go forward if they were to receive their money. (V. 3:715, V. 4:903) Haas was also angry that he did not receive more money, as he accused people of taking his share. (V. 4:953) This accusation included Conn. Haas also testified that he had received $46,000 on a previous DEA deal. (V. 6:1705) Pilot Anderson testified that he had "reinvested" the $15,000 he received in another DEA operation. (V. 4:1104) The evidence also clearly shows that both Haas and Conn attempted to continue their entrepeneurial activities after the operation by contacting both Mel Anderson (V. 4:963) and Bill Gray. (V. 3:661) Furthermore, neither of the parties had filed

any statements with the Internal Revenue Service, in regard to the amounts received. (V. 3:712, V. 6:1709) Conn, the more guileless of the pair, stated that he hoped he would not have to pay taxes on the amount received, (V. 3:712) despite the fact that the DEA was aware that the four parties in question had received money. (V. 4:1182) As Conn noted in his telephone conversation with Gray in regard to Haas, he "works with the DEA just for the money". (V. 3:805)

Unlike the pilots and Haas, Conn was not involved with the DEA, "just for the money". As previously noted, Conn had fears about the Thomasville situation and it seems clear that the DEA, operating through Haas, manipulated Conn into believing that if he assisted the DEA in Mobile, he would receive assistance in Thomasville. The fact that the DEA lacked the authority to make the promises they made, is irrelevant in regard to this situation, since the key issue is whether Conn believed that they could. (V. 3:684, V. 3:717) His prime motivation for his involvement was thus fear.

The final outrage, of course, is the attempted recruitment of Anderson and Gray into the reprehensible schemes of the DEA. Both men were in a similar situation to Conn in that they faced criminal charges. (V. 3:661, V. 4:964) The end result was that Anderson did succumb to the pressure, and to the promise of $200,000 and flew a flight in which he lost his life. (V. 4:1052) Gray refused to cooperate and remains alive today.

As we have shown, law enforcement activity in this case surpasses any governmental misconduct previously reported. It is in short a disgraceful attempt by government agents to set people up for economic gain. If other people suffer misfortune from such conduct, so much the

better, since that will increase the chances of ill-gotten gain. That such conduct is foreign, alien and contrary to civilized standards of criminal justice must be clear. For as Mr. Justice Brandeis stated in his famous dissent in *Olmstead v. United States*, 277 U.S. 438, 484 (1928), "Decency, security and liberty alike demand that government officials shall be subjected to the same rules of conduct that are commands to the citizen. In a government of laws, existence of the government will be imperiled if it fails to observe the law scrupulously . . . To declare that in the administration of the criminal law, the end justifies the means, to declare that the government may commit crimes in order to secure the conviction of a private criminal, would bring terrible retribution."

Petitioner contends that this case is an appropriate one for the granting of certiorari on the above stated issue.

In sum, the evidence introduced at trial showed the government's use of profiteers, who organized and pushed forward the scheme from start to finish. One of these profiteers, Joseph Haas, had a financial stake in the operation and was involved strictly for monetary gain. The other profiteer, Edward Conn, was manipulated into cooperating on transparent promises of assistance in regard to other pending drug charges against him. Throughout the entire episode, the various government officials and agents involved showed a marked disrespect for the rules and regulations of several government agencies as well as the laws of foreign countries. Whether such behavior on behalf of the government is such that it "shocks the conscience" and is contrary to civilized standards of decency and justice is an issue of substantial constitutional import. The circuit courts appear to be in conflict on this question. In cases such as *Greene v. United States*, 454 F.2d

783 (9th Cir. 1977) and *United States v. Twigg*, 588 F.2d 373 (3rd Cir. 1978) other circuits have found "outrageous government conduct" where the activities of law enforcement officers were no more objectionable than in the present case in which the Fifth Circuit found that the conduct did not violate due process. *United States v. Gray*, 626 F.2d 494 (1980). Accordingly, certiorari should be granted so the Court can decide this question and settle the law in this area.

II. THE COURT SHOULD ACCEPT CERTIORARI TO CORRECT THE DECISION OF THE FIFTH CIRCUIT ON THE ISSUE OF RESTRICTED CROSS-EXAMINATION WHICH IS IN CONFLICT WITH THE *DAVIS v. ALASKA*, 415 U.S. 308 (1974) LINE OF CASES DECIDED BY THIS COURT.

The defense cross-examination questions to which the Fifth Amendment was invoked were asked for two reasons. They were aimed at disclosing a possible lack of credibility, bias or ulterior motive on the part of the government's primary witness and they were aimed at showing a continuous pattern of government misconduct in support of defendant's motion to dismiss. (V. 2:544-45)

The questions propounded by the defense as to subsequent operations and Conn's involvement again had two purposes. They were aimed at discrediting Conn by showing the extent of his involvement with the DEA and their operations and any financial incentive he might have to cooperate with the government. In this regard the Ninth and Sixth Circuits have held that a defendant should be permitted to cross-examine a government informer as to the informer's total compensation from other government cases. *United States v. Leja*, 568 F.2d 493

(1977); *Harris v. United States*, 371 F.2d 365 (1967). They were also intended to demonstrate a pattern of government misconduct.

Just as with the invocation of the Fifth Amendment privilege, the restrictions placed on the defense's questioning under the rationale of protecting ongoing investigations had the effect of denying defendant the right to cross-examination as well as a full and fair hearing on government misconduct. Here the alleged misconduct consists of the very sort of ongoing investigations (and use of the same informant herein) that are serving to prevent the defense from effectively presenting the misconduct defense. In such a situation the protection of the ongoing investigations must give way to the fundamental rights of the defendant to present his defense through effective cross-examination. Whether any prejudice actually resulted from the limitations placed on cross-examination is irrelevant. If cross-examination was unduly limited the Sixth Amendment has been violated and a reversal is required. *Alford v. United States*, 282 U.S. 687 (1931); *Davis v. Alaska, supra.*

The Petitioner would submit that the position of the Fifth Circuit on the restricted examination question is in conflict with the opinions of this Honorable Court and justifies the grant of certiorari to review the judgment below.

III. THE COURT SHOULD GRANT CERTIORARI TO DECIDE WHETHER THE FIFTH CIRCUIT'S APPLICATION OF THE "CONTINUING OFFENSE" STATUTE (18 U.S.C. §3237) TO THE CRIME OF IMPORTATION UNDER 21 U.S.C. §952(a) SO AS TO ALLOW THE PROSECUTION OF PETITIONER IN ALABAMA WHEN THE CONTRABAND ACTUAL-

LY ARRIVED IN MISSISSIPPI OFFENDS ARTICLE III, §2, CLAUSE 3 AS WELL AS THE SIXTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

Article III, §2 and the Sixth Amendment of the United States Constitution require that a defendant be tried in the State and District in which the crime was committed.

In this case the crime of importation of marijuana (21 U.S.C. §952) was committed in Mississippi, not in Alabama. As noted in the search warrant affidavit and by undisputed testimony throughout the trial, the airplane which transported the marijuana from South America into the United States left from and returned to Stennis Airfield outside Bay St. Louis, Mississippi where the marijuana was unloaded from the plane. It was at this point that the crime of importation was completed and the trial for the offense of importation should, therefore, have been held in Mississippi. Petitioner filed a motion to dismiss counts 3 and 4 of the indictment for lack of venue prior to trial (R. 1:110) but the trial judge denied this motion (R. 1:111) and the Petitioner was tried for both counts in the Southern District of Alabama.

The Petitioner is aware that prior Fifth Circuit caselaw as well as the law of the other circuits has treated the crime of importation as a continuing offense under 18 U.S.C. §3237 which is subject to multiple venue. However, it is Petitioner's contention that such a construction of 21 U.S.C. §952 unjustifiably infringes on the venue requirements of Art. III, §2 and the Sixth Amendment of the United States Constitution. Certiorari should be granted so the Court can determine whether the application of §3237 to the crime of importation as it was in this case violates the Constitution and should, therefore, be prohibited.

CONCLUSION

For the foregoing reasons and for the reasons submitted by co-petitioners, which are hereby joined in, Petitioner respectfully requests that a Writ of Certiorari issue to review the judgment of the Fifth Circuit Court of Appeals which affirmed in part his conviction.

Respectfully submitted,
MARTIN & YOUNG

By: /s/
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CERTIFICATE OF SERVICE

I hereby certify that I have this date served a copy of the within and foregoing Petition for Writ of Certiorari upon Mr. W. A. Kimbrough, Jr., United States Attorney, P. O. Drawer "E", Mobile, Alabama 36601, and upon Mr. Wade McCree, Jr., Solicitor General, Department of Justice, Washington, D. C. 20530, by depositing same in the United States Mail in a properly addressed envelope with adequate postage affixed thereon to insure delivery.

This the 19th day of December, 1980.

/s/

JOHN R. MARTIN
Attorney for Petitioner,
Ronald Cecil Barker

APPENDIX

APPENDIX A

UNITED STATES of America,
Plaintiff-Appellee,

v.

Billy W. GRAY, Lee Andrew Fennell, Roger Lee Wright, Ronald Cecil Barker and Vance C. Dyar,
Defendants-Appellants.

No. 79-5133.

United States Court of Appeals,
Fifth Circuit.

Sept. 26, 1980.

Defendants were convicted before the United States District Court for the Southern District of Alabama, Virgil Pittman, Chief Judge, of narcotics offenses, and they appealed. The Court of Appeals, Politz, Circuit Judge, held that: (1) action of government informants in suggesting marijuana smuggling scheme and aiding in arranging the air transportation did not constitute government misconduct so as require reversal of defendants' convictions; (2) trial court did not err in sustaining objections to defense counsel's questions to government informant as to whether the informant had committed a crime in connection with certain drug charges pending against him, since informant had made known his intent to invoke the Fifth Amendment, and informant had testified that he had been charged with a drug offense and had admitted that he had been offered immunity in exchange for his help in the instant case; and (3) trial court committed reversible error in instructing jury that, once conspiracy was established, the Government was required to introduce only slight evidence of a particular defendant's participation; the conspiracy convictions of those defendants who had ob-

jected at trial to the instruction would be reversed, as well as the conviction of defendant who initially requested the instruction but subsequently joined in codefendants' objection, but defendant who requested the instruction and did not subsequently join in codefendants' objection was not entitled to reversal.

Affirmed in part and reversed in part.

1. Criminal Law 1132

On appeal from defendants' narcotics convictions, Court of Appeals would consider the arguments of each defendant to have been adopted by each of the remaining defendants, despite the failure of all but one of the defendants to specifically adopt the codefendants' arguments by reference in their briefs, since the adoption did not prejudice the Government which had the opportunity to fully brief all issues in response to various contentions of defendants, and since it would be anomalous to reverse some convictions and not others when all defendants suffered from the same error. F.R.A.P. Rules 2, 28(i), 28 U.S.C.A.

2. Criminal Law 113

In narcotics prosecution involving marijuana which was imported into Mississippi and then transported to Alabama where defendants were arrested, venue was proper in Alabama, since importation of a controlled substance is a continuous crime that is not complete until controlled substance reaches its final destination, and venue is proper in any district along the way.

3. Drugs and Narcotics 188

Search warrant affidavit which stated that informant had provided reliable information in the past resulting in convictions for drug violations, which set forth informa-

tion given by informant telling when plane carrying marijuana would arrive at specified location and describing the truck onto which the marijuana would be loaded, and which stated that informant's data was supported and corroborated by observations of drug enforcement agents, articulated sufficient basis for the claim of informant's reliability. Fed.Rules Cr.Proc. Rule 41(a), 18 U.S.C.A.

4. Criminal Law 37(8)

Action of government informants in suggesting marijuana smuggling scheme and aiding in arranging the air transportation did not constitute government misconduct so as to require reversal of defendants' convictions, since defendants provided the airplane, the money and sources of supply in Colombia, and defendants made arrangements for transportation of the marijuana after its arrival in United States; furthermore, fact that one informant was paid about $37,000 for his services and that other informant received $25,000 did not establish misconduct, in absence of proof that a contingent fee was promised to the informants.

5. Criminal Law 394.1(1)

Although high informant fees are suspect, informant's testimony will not be rejected unless there is evidence that he was promised payment contingent upon conviction of a particular person.

6. Criminal Law 662(1)

In narcotics prosecution, trial court did not err in sustaining objections to defense counsel's questions to government informant as to whether the informant had committed a crime in connection with certain drug charges pending against him, since informant had made known

his intent to invoke the Fifth Amendment, and informant had testified that he had been charged with a drug offense and had admitted that he had been offered immunity in exchange for his help in the instant case. U.S.C.A.Const. Amends. 5, 6.

7. Criminal Law 662(1)

There is no Sixth Amendment right to compel witness to go through the exercise of taking the stand when one knows in advance that witness will assert his Fifth Amendment right against self-incrimination. U.S.C.A. Const. Amends. 5, 6.

8. Witnesses 268(1)

Trial judge may refuse to allow disclosure of witness' address or place of employment when value of the evidence is outweighed by danger to witness' safety, and government is entitled to same protection when probative value of evidence is outweighed by risk inherent in exposing incomplete investigations.

9. Witnesses 372(2)

In narcotics prosecution, trial court did not err in refusing to allow defense counsel to ask government informant specific questions about operations informant had been subsequently involved in and whether the informant was involved in a particular operation in South America, since defendants had brought out what informant received for his assistance and that informant was continuing to work for the government, and thus informant's potential bias was fully exposed to jury.

10. Conspiracy 48.2(2)
Criminal Law 1137(3), 1172.2

In narcotics prosecution, trial court committed reversible error in instructing jury that, once the conspiracy was

established, the Government was required to introduce only slight evidence of a particular defendant's participation; the conspiracy convictions of those defendants who had objected at trial to the instruction would be reversed, as well as the conviction of defendant who initially requested the instruction but subsequently joined in codefendants' objection, but defendant who requested the instruction and did not subsequently join in codefendants' objection was not entitled to reversal.

11. Criminal Law 1137(2)

Under the doctrine of invited error, a defendant who asks for instruction will not be heard to complain about the instruction on appeal.

12. Criminal Law 997.15(2)

In a collateral attack on a sentence, prisoner had burden of showing that court considered an invalid prior conviction. 28 U.S.C.A. § 2255.

13. Criminal Law 1177

On appeal from defendant's narcotics convictions, Court of Appeals would invoke the concurrent sentence doctrine and decline to review the sufficiency of evidence supporting defendant's importation and conspiracy to import convictions, since defendant conceded that there was enough evidence for conviction of distribution and possession with intent to distribute marijuana, defendant was given concurrent sentences on all counts, and defendant did not come forward with information tending to show that there was reason to believe the challenged counts influenced the sentence imposed on the unchallenged count.

14. Criminal Law 1171.1(3)

In narcotics prosecution, action of prosecutor during closing argument in referring to an alleged member of the conspiracy by defendant's name did not require reversal, in view of trial court's admonition to the effect that there was no kinship between the alleged member of conspiracy and defendant.

Appeals from the United States District Court for the Southern District of Alabama.

Before WISDOM, KRAVITCH and POLITZ, Circuit Judges:

POLITZ, Circuit Judge:

Billy Gray, Lee Fennell, Roger Wright, Ronald Barker and Vance Dyar were convicted of: (1) distribution and possession with intent to distribute marijuana, 21 U.S.C. § 841(a)(1); (2) conspiracy to distribute and to possess with intent to distribute marijuana, 21 U.S.C. § 846; (3) importation of marijuana, 21 U.S.C. § 952(a); and (4) conspiracy to import marijuana, 21 U.S.C. § 963. They received concurrent sentences on all counts. They appeal, contending: (1) each defendant may adopt the arguments of the others on appeal, albeit not urged in their briefs; (2) venue was improper; (3) a DEA affidavit supporting a search warrant inadequately established probable cause; (4) there was government misconduct because of entanglement in the criminal scheme and excessive payments to informants; (5) the trial judge improperly limited cross-examination; (6) the jury was erroneously instructed that "slight evidence" was all that was needed for a conviction; (7) the evidence was insufficient to convict Fennell; and

(8) the prosecution prejudiced Ronald Barker in its closing arguments. We reverse in part and affirm in part.

Laden with 12,000 pounds of marijuana, the defendants flew into Stennis Field in Mississippi early on the morning of July 24, 1978. They loaded the marijuana onto waiting trucks and drove to somewhere near Mobile, Alabama, where the trucks were searched and they were arrested. They were tried in the U.S. District Court for the Southern District of Alabama.

Two DEA informants, Ed Conn and Joe Haas, provided crucial testimony at trial. Conn had a history of drug smuggling, having been indicted for a 1978 scheme to smuggle 8,000 pounds of marijuana into Thomasville, Georgia. The DEA promised him help with his Thomasville problems in exchange for his cooperation. Conn was paid $25,000 for his work in this case. Haas had worked with the DEA for a period of about 10 years and was paid about $37,000 for his efforts in this case.

I. Adoption of Codefendants' Arguments.

[1] On appeal, only Wright followed Fed.R.App.P. 28(i) and adopted his codefendants' arguments by reference in his brief. The other defendants waited until oral argument to adopt their codefendants' contentions. Ordinarily we would limit each defendant's appeal to the issues raised in his brief. However, we have discretion to suspend the Federal Rules of Appellate Procedure "for good cause shown," Fed.R.App.P. 2. Believing it anomalous to reverse some convictions and not others when all defendants suffer from the same error, we consider the arguments to be adopted, except as noted. *United States v. Anderson*, 584 F.2d 849 (6th Cir. 1978). *See also Marcaida v. Rascoe*, 569 F.2d 828 (5th Cir. 1978); 9 *Moore's Federal*

Practice ¶228.02[8] (2d ed. 1980). This adoption does not prejudice the government which had the opportunity to fully brief all issues in response to the various contentions of the defendants.

II. Venue.

[2] The defendants claim an abridgement of their Sixth Amendment right to a trial in "the State and district wherein the crime shall have been committed." The marijuana was imported into Mississippi and then transported to Alabama, where the defendants were arrested for violating 21 U.S.C. § 952(a). The defendants contend that the Sixth Amendment requires that the trial be held in the state of importation, Mississippi, and not the state of arrest, Alabama. Defendants err.

We are in accord with the decision of our brethren of the Tenth Circuit. *United States v. Jackson*, 482 F.2d 1167 (10th Cir. 1973), *cert. denied*, 414 U.S. 1159, 94 S.Ct. 918, 39 L.Ed.2d 111 (1974), wherein it was held that importation of a controlled substance in violation of 21 U.S.C. § 952(a) is a "continuous crime" that is not complete until the controlled substance reaches its final destination point, and that venue is proper in any district along the way. We adopted the reasoning of *Jackson* in our decision in *United States v. Godwin*, 546 F.2d 145 (5th Cir. 1977).

III. Fourth Amendment.

[3] The defendants contend that the evidence resulting from the search of the tractor-trailer should have been suppressed because the DEA's affidavit for a search warrant, grounded on information from an informant, did not articulate the basis for the claim of reliability of the informant. This contention is without the semblance of merit.

The affidavit stated that the informant had provided reliable information in the past resulting in convictions for drug violations, and set forth information given by the informant telling when the plane carrying the marijuana would arrive at Stennis Field and describing the truck onto which the marijuana would be loaded. This alone would have been enough to sustain the affidavit under Fed.R. Crim.P. 41(a), the past reliability of the informant plus the detailed information given indicating that the informant knew whereof he spoke. *United States v. Jenkins*, 525 F.2d 819 (6th Cir. 1975). There was additional confirmation of the informant's reliability. The affidavit stated that DEA agents were present at Stennis Field, they saw a plane land there at about the time given by the informant, and saw people unload several bales from the plane into a truck that matched the description given by the informant. The agents' check of the bumper of the truck revealed marijuana seeds. When the informant's data is supported and corroborated by the observation of the affiant, probable cause is established. *Marderosian v. United States*, 337 F.2d 759 (1st Cir. 1964), *cert. denied*, 380 U.S. 971, 85 S.Ct. 1328, 14 L.Ed.2d 268 (1965).

IV. Government Misconduct.

[4] The defendants contend that the government's conduct was so outrageous as to require reversal of their convictions for failure of due process. *United States v. Graves*, 556 F.2d 1319 (5th Cir. 1977), *cert. denied*, 435 U.S. 923, 98 S.Ct. 1485, 55 L.Ed.2d 516 (1978).

Conn and Haas first met Gray at an airplane auction in Missouri. According to the defendants, Haas raised the subject of smuggling to Gray, thereby initiating the drug scheme. Later, Conn offered to provide a plane, but with-

drew the offer because the plane was under observation by several government agencies. The defendants then bought their own plane, with Conn providing repair services and the airstrip and Haas providing the crew. Conn and Haas never had any contact with Dyar, Barker, Wright and Fennell.

The defendants organized and ran the operation: they provided the airplane, the money and the sources of supply in Colombia, and they made the arrangements for transportation of the marijuana from Stennis Field. The informants may have suggested the scheme and aided in arranging the air transportation. This does not constitute government misconduct. The providing of essential aid is not misconduct per se. *Hampton v. United States*, 425 U.S. 484, 96 S.Ct. 1646, 48 L.Ed.2d 113 (1976) (government supplied narcotics); *United States v. Russell*, 411 U.S. 423, 93 S.Ct. 1637, 36 L.Ed.2d 366 (1973) (government provides essential ingredient for manufacture of illegal drug). Here the informants merely eased the way for the conspirators. *Cf. United States v. Thomas*, 567 F.2d 638 (5th Cir. 1978), *cert. denied*, 439 U.S. 822, 99 S.Ct. 90, 58 L.Ed.2d 114 (government offer which was never acted on, to supply airplane, crew, and name of foreign supplier, was not misconduct). *But cf. United States v. Twigg*, 588 F.2d 373 (3rd Cir. 1978) (government misconduct found where agent suggested establishment of drug laboratory, provided place, equipment, supplies and know-how, and then ran entire enterprise operation merely assisted by defendants).

[5] The defendants also contend that there was misconduct because the informants were paid excessive amounts of money. Haas was paid about $37,000 for his services and Conn received $25,000. Although high informant fees

are and must be suspect, an informant's testimony will not be rejected unless there is evidence that he was promised payment contingent upon conviction of a particular person. *United States v. Garcia*, 528 F.2d 580 (5th Cir. 1976), *cert. denied*, 426 U.S. 952, 96 S.Ct. 3177, 50 L.Ed.2d 1190, 429 U.S. 898, 97 S.Ct. 262, 50 L.Ed.2d 182. There is neither allegation nor proof that a contingent fee was promised to either Conn or Haas.

Nor is there misconduct in the offer to help Conn with his Thomasville problems because that promise of help did not depend on whether Conn's testimony played a part in the conviction of a specific person.[1]

There is no merit in defendants' claim of government misconduct warranting dismissal of the indictments.

V. Limitation on Cross-Examination.

Conn's testimony lies at the heart of the government's case. The defendants sought to discredit Conn by informing the jury that he had a drug charge pending against him in another airplane smuggling operation in Thomasville, Georgia, and that the DEA had offered him help with that charge in return for his help in this case. Counsel asked several questions about whether Conn had committed a crime in the Thomasville operation. The district judge sustained objections to these questions because Conn had made known his intent to invoke the Fifth Amendment.

[6, 7] The defendants contend that this limitation on cross-examination infringed their Sixth Amendment right

[1] The defendants allege one other basis for misconduct. They argue that Conn, with DEA approval, bribed Colombian officials on this operation. The record reflects a bribe but it was done at a subsequent time as part of an effort by Conn to get a pilot friend out of a Colombian jail. The DEA was aware of the purpose of this subsequent trip by Conn, but it had nothing to do with it.

to confrontation of witnesses. We disagree. Conn testified that he had been charged with a drug offense in Thomasville and admitted that the DEA had offered him immunity in exchange for his help in this case. The predicate for impeachment was laid. There was no violation of defendants' right to confrontation. *United States v. Onori*, 535 F.2d 938 (5th Cir. 1976). The district court did not abuse its discretion in holding that whether Conn actually committed a crime in Thomasville was beyond the pale of appropriate cross-examination. We are persuaded the jury adequately understood the matter. There is no Sixth Amendment right to compel a witness to go through the exercise of taking the stand when one knows in advance that the witness will assert his Fifth Amendment right against self-incrimination. There is no Sixth Amendment right to force another to "take the Fifth." *United States v. Bolts*, 558 F.2d 316 (5th Cir. 1977), *cert. denied*, 439 U.S. 898, 99 S.Ct. 262, 58 L.Ed.2d 246 (1978).

The trial judge allowed the defense to ask Conn whether he had been paid by the DEA for his part in other operations. However, the court refused to allow the defense to ask specific questions about operations Conn had been subsequently involved in, and whether he was involved in a particular operation in South America. The judge reasoned that such cross-examination might jeopardize ongoing investigations by the government.

[8, 9] The defendants contend that this violated their Sixth Amendment right to confrontation, and that they were entitled to cross-examine a government informer as to the informant's total compensation from other government cases, citing *United States v. Leja*, 568 F.2d 493 (6th Cir. 1977). We disagree. A trial judge may refuse to allow disclosure of a witness' address or place of employment

when the value of the evidence is outweighed by the danger to the witness' safety. Fed.R.Evid. 611(a); *United States v. Rice*, 550 F.2d 1364 (5th Cir. 1977), *cert. denied* 434 U.S. 954, 98 S.Ct. 479, 54 L.Ed.2d 312; 3 Weinstein and Berger, *Weinstein's Evidence* ¶607[03], pp. 607–31. The government is entitled to the same protection when the probative value of the evidence is outweighed by the risks inherent in exposing incomplete investigations. The defense brought out what Conn received for his assistance, and that he was continuing to work for the DEA. This fully exposed Conn's potential bias to the jury. The district judge was well within the ambit of his discretion in refusing to allow more detail that might jeopardize ongoing investigations.

VI. Jury Instructions.

[10] The defendants contend that the trial judge erred in giving an instruction on conspiracy. Ordinarily this would not be reviewable under the concurrent sentence doctrine, *United States v. Rubin*, 591 F.2d 278 (5th Cir. 1979), *cert. denied*, 100 S.Ct. 133, because the defendants were also convicted of distribution and possession with intent to distribute marijuana, 21 U.S.C. § 841(a)(1), and importation of marijuana, 21 U.S.C. § 963, and were given concurrent sentences on all counts. The defendants, however, contend that the erroneous instructions tainted the convictions on the substantive counts as well, which mandates our review of the instructions. *United States v. Burrell*, 505 F.2d 904 (5th Cir. 1974).

The trial court gave the jury a proper instruction on conspiracy. Unfortunately, it did not leave well enough alone. At the request of Gray and Dyar, it added:

> The Government need only introduce slight evidence of a particular defendant's participation, once

> the conspiracy is established, but must establish beyond a reasonable doubt that each member had a knowing, special intent to join the conspiracy. Mere association with a conspirator, of course, is not enough.

This instruction is reversible error. *United States v. Partin*, 552 F.2d 621 (5th Cir. 1977), *cert. denied*, 434 U.S. 903, 98 S.Ct. 298, 54 L.Ed.2d 189; *United States v. Hall*, 525 F.2d 1254 (5th Cir. 1976); *United States v. Brasseaux*, 509 F.2d 157 (5th Cir. 1975).

Barker and Dyar objected to the instruction, and the trial judge sought to correct his error. He called the jury back in and said:

> Ladies and gentlemen, I want to make some clarifying comments about one of the written charges.
>
> The Government need only introduce slight evidence of a particular defendant's participation once the conspiracy is established, but must establish, beyond a reasonable doubt, that each member had a knowing special intent to join the conspiracy. Mere association with a conspirator is not enough.
>
> My particular remarks that I want to make to you about the slight evidence is that means that just a little evidence as to participation, but even as to that slight or little evidence, you must be convinced, beyond a reasonable doubt, that he participated.

Unfortunately this attempt only worsened the matter. The "slight evidence" reference can only be seen as suffocating the "reasonable doubt" reference.

The defendants further contend that this attempt to clarify the "slight evidence" instruction on the conspiracy tainted the instructions given on the substantive counts. We disagree. In his ill-fated effort to cure the "slight evidence" error in the conspiracy instructions, the trial judge

specifically said that he wanted to clarify "*one* of the written charges." His explanation clearly went to the amount of evidence necessary to establish participation in a conspiracy. No reasonable juror could have thought that the judge was instructing him to convict on "slight evidence" of importation or possession and distribution. Upon our review of the entire charge, including the return-to-courtroom epilog quoted above, we conclude that, considered in its totality, the charge fairly and accurately informed the jury and the slight evidence aberration did not distort or corrupt the charges as given on the substantive counts.

[11] The conspiracy convictions of Fennell, Wright and Barker must be reversed. Gray and Dyar requested the "slight evidence" charge. Under the doctrine of invited error, a defendant who asks for an instruction will not be heard to complain about the instruction on appeal. *United States v. Easterly*, 444 F.2d 1236 (5th Cir. 1971).[2]

Gray did not specifically join his codefendants' objection at trial and did not adopt their position in his brief. If he were the sole defendant the invited error doctrine would foreclose further consideration of his complaint about the slight evidence charge. The question is whether his codefendants' actions preserve his position. We conclude otherwise. First, a defendant who asks for a jury instruction cannot silently join his codefendants' vocal objection to his request. Were silent joinder allowed, when codefendants agree to adopt each other's objections there

[2] The invited error doctrine bars reversal even if the instruction constituted plain error, *United States v. Davis*, 443 F.2d 560 (5th Cir. 1971), *cert. denied*, 404 U.S. 945, 90 S.Ct. 298, 30 L.Ed.2d 260, although *Davis*' continued validity is open to some doubt. *See United States v. Trevino*, 565 F.2d 1317 (5th Cir. 1978), *cert. denied*, 435 U.S. 971, 98 S.Ct. 1613, 56 L.Ed.2d 63 (dictum). The "slight evidence" instruction was held not to be plain error in *United States v. Brasseaux*, 509 F.2d 157 (5th Cir. 1975).

would be an incentive for each defendant to ask for an erroneous instruction in the hope of trapping the judge. Then by operation of the silent joinder mechanism, each defendant would have the advantage of the error he invited. To avoid being foreclosed by the invited error doctrine, we conclude that the party who invites the error must inform the court that he no longer seeks the challenged instruction. Second, we hold that Gray cannot silently join his codefendants' appeal on this issue. Failure to timely object to an instruction waives the right to appeal. Fed.R.Crim.P. 30. Similarly, failure to timely withdraw a request for an erroneous instruction precludes a defendant from joining his codefendants' appeal as to that instruction.

Dyar presents a different issue. He asked for the "slight evidence" instruction, but then specifically joined Barker's objection to the instruction. This was enough to withdraw and thereby avoid the effects of the invited error doctrine. Dyar did not waive his right to appeal and he may appropriately adopt his codefendants' attack on the "slight evidence" instruction. To hold otherwise would result in the anomaly referred to in Part I, *infra*.

VII. Sufficiency of the Evidence.

Fennell contends that there is insufficient evidence to sustain the conviction of importation of marijuana, 21 U.S.C. § 952(a) [3] and conspiracy to import marijuana, 21 U.S.C. § 963. He concedes that there was enough evidence for the conviction of distribution and possession with intent to distribute marijuana, 21 U.S.C. § 841(a)(1).

[3] The sufficiency of the evidence for the conviction for conspiracy to import marijuana is at issue here, even though it was reversed because of the "slight evidence" charge. Fennell faces the possibility of a new trial on the conspiracy to import charge unless the evidence is found insufficient. This issue applies only to Fennell.

Fennell was given concurrent sentences on all counts. The question is whether the concurrent sentence doctrine negates the necessity for review of his importation conviction.

The concurrent sentence doctrine is not a sentencing doctrine, but rather, it is a genus of appellate review rules. It clothes appellate courts with the discretion to decline review of convictions in certain instances when a defendant is given concurrent sentences on two or more counts. The rationale for the doctrine is judicial efficiency, the hope being that by the application of the rule, courts can avoid making time-consuming decisions which result in no meaningful "bottom line" difference to the defendant.

The doctrine has been applied in this circuit and elsewhere. *United States v. Warren*, 612 F.2d 887 (5th Cir. 1980);[4] Comment, "The Concurrent Sentence Doctrine after *Benton v. Maryland*," 7 *U.C.L.A. Atlas L.Rev.* 282; Note, "The Federal Concurrent Sentence Doctrine," 70 Colum.L.Rev. 1099 (1970). It has been the subject of intense discussions. *See*, dissent by Roney and Hill, JJ., in *Warren*, *id.* at 891.

Fennell argues that the concurrent sentence doctrine should not be applied to him because the court may have considered the importation and conspiracy to import charges in setting the sentences for possession with intent to distribute and conspiracy to possess with intent to distribute. We are not persuaded.

If the possibility that a sentencing judge might consider a challenged count in sentencing for an unchallenged one were enough to bar application of the concurrent sen-

[4] *See, e. g., United States v. Dubea*, 612 F.2d 950 (5th Cir. 1980); *United States v. Alfrey*, 612 F.2d 180 (5th Cir. 1980); *United States v. Ortiz*, 610 F.2d 280 (5th Cir. 1980); *United States v. Vasquez-Vasquez*, 609 F.2d 234 (5th Cir. 1980).

tence doctrine, the doctrine would cease to exist. As cited above and in footnote 4, we have recognized the concurrent sentence doctrine in this circuit. Fennell's proposed rule would require that we ignore the decisions in these earlier cases. This we may not do. Rather, we must examine the circumstances of the questioned sentence and apply the doctrine as we understand it.

[12] First, we must determine whether the district court expressly considered the challenged counts in sentencing on the unchallenged count. In a collateral attack on a sentence, under 28 U.S.C. § 2255, the prisoner has the burden of showing that the court considered an invalid prior conviction. *Tallent v. United States*, 604 F.2d 370 (5th Cir. 1979). When the question is as presented here—whether the concurrent sentence doctrine precludes appellate review—the defendant's burden is limited to presenting information tending to show consideration of the challenged counts. Fennell makes no showing that the district court considered the challenged counts in its sentencing.

[13] Second, we examine the length of the sentence compared to the statutory limits. Out of a maximum sentence of five years on the possession with intent to distribute count,[5] 21 U.S.C. § 841(b)(1)(B), Fennell was given a three-year sentence.[6]

A sentence in the middle of the statutory range strongly suggests that the other convictions were not considered. *Cf. United States v. Febre*, 425 F.2d 107 (2d Cir. 1970), *cert. denied*, 400 U.S. 849, 91 S.Ct. 40, 27 L.Ed.2d 87

[5] Fennell had never been convicted of a federal drug offense before, so he was not subject to a ten year sentence. 21 U.S.C. § 841(b)(1)(B).

[6] Fennell also received two years' probation, as required by the statute.

(applying concurrent sentence doctrine where trial court imposed sentences only one year above the statutory minimum, and where there was other evidence that the number of the counts did not influence the length of the sentences).

Third, we compare the seriousness of the challenged and the unchallenged counts. If the challenged counts are more serious than the unchallenged counts, there is an increased likelihood that the sentence on the unchallenged count was influenced by the sentences on the challenged counts. In *United States v. Cardi*, 519 F.2d 309 (7th Cir. 1975), a defendant was sentenced to concurrent sentences on three counts, and a consecutive sentence on a fourth count. On appeal, the concurrent sentence doctrine was not applied, and two of the concurrent sentences were reversed. The defendant then petitioned the district court for a reduction in sentence under Fed.R. Crim.P. 35, contending that the invalid convictions might have influenced the sentences on the valid convictions. The district court denied the motion, saying that it had not considered the invalid convictions in the original sentence, and the Seventh Circuit affirmed, partly because the invalid convictions were no more serious than the valid convictions. The court distinguished *McGee v. United States*, 462 F.2d 243 (2d Cir. 1972), in which the invalid count involved a far more important matter than the other counts. 519 F.2d at 312–13. In this case, Fennell was convicted of four drug counts arising out of the same transaction, all of which carried the same potential penalty. 21 U.S.C. §§ 841(b)(1)(B), 846. None was more serious in impact than the others.

The exact resting point of the burden of persuasion in the corridors of the concurrent sentence arena is not yet

set in concrete. *United States v. Warren*, 612 F.2d at 896 (Roney and Hill, JJ., dissenting). Nor need we pour that concrete today, for Fennell has not come forward with information tending to show that there is reason to believe the challenged counts influenced the sentence imposed on the unchallenged counts. He says so, but the mere saying does not make it so. Invoking the concurrent sentence doctrine, we decline to review Fennell's importation and conspiracy to import convictions for sufficiency of the evidence.

VIII. Closing Arguments.

[14] Richard Brown was an alleged member of the conspiracy who avoided arrest. One witness momentarily referred to Richard Brown as Richard Barker, but it is not clear whether this was a slip of the tongue, or whether Brown used Richard Barker as an alias. In his closing arguments, the prosecutor referred to Brown as Richard Barker several times, and made one reference to "the Barkers."

Ronald Barker objected, contending that there was insufficient proof that Richard Brown used the name Richard Barker, and that the prosecution had prejudiced him (Ronald Barker) by implying that he was Richard Brown/Barker's brother. The prosecution's conduct was less than laudable, but the trial judge dispelled any prejudice by immediately telling the jury that there was little evidence to show that Richard Brown had used the name Richard Barker, that he had instructed the U.S. Attorney to stop referring to Richard Brown as Richard Barker, and that there was no kinship between Richard Brown and Ronald Barker. There is no reversible error in this complaint.

The conspiracy convictions of Fennell, Wright, Barker and Dyar are REVERSED.

All other convictions are AFFIRMED.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 79-5133

COURT OF APPEALS
FILED
OCT 28 1980
GILBERT E. GANUCHEAU
CLERK

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

BILLY W. GRAY,
LEE ANDREW FENNELL,
ROGER LEE WRIGHT,
RONALD CECIL BARKER and
VANCE C. DYAR,

Defendants-Appellants.

- - - - -

Appeals from the United States District Court for the
Southern District of Alabama

- - - - -

ON PETITION FOR REHEARING

(OCTOBER 23, 1980)

Before WISDOM, KRAVITCH and POLITZ, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed as to RONALD C. BARKER in the above entitled and numbered cause be and the same is hereby denied.

ENTERED FOR THE COURT:

Henry A. Politz
United States Circuit Judge

Form 703-2

United States Court of Appeals

FOR THE FIFTH CIRCUIT

October Term, 19

No. 79-5133

D.C. Docket No. CR-78-73

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

BILLY W. GRAY, LEE ANDREW FENNELL, ROGER LEE WRIGHT, RONALD CECIL BARKER and VANCE C. DYAR,

Defendants-Appellants.

- - - - -

Appeals from the United States District Court for the Southern District of Alabama

- - - - -

Before WISDOM, KRAVITCH and POLITZ, Circuit Judges.

J U D G M E N T

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Alabama, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the conspiracy convictions of the said District Court in this cause as to Fennell, Wright, Barker and Dyar be, and the same are hereby reversed; All other convictions are affirmed.

September 26, 1980

Issued as Mandate:

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF ALABAMA SOUTHERN DIVISION

UNITED STATES OF AMERICA V. VANCE C. DYAR, et al.,	CRIMINAL NO. 78-73

ORDER ON DEFENDANTS' MOTIONS TO DISMISS BASED UPON GOVERNMENTAL MISCONDUCT

The defendants Barker, Dyar, Gray, Fennell, and Wright were charged in a four-count indictment with criminal acts involving marijuana importation in violation of 21 U.S.C. §§841(a)(1), 846, 952(a), 963. Prior to trial, all five defendants filed motions to dismiss the indictment based upon governmental misconduct through the Drug Enforcement Administration's (DEA) use and payment of two informants, Joe Haas and Ed Conn.

A jury was impanelled to try the defendants on January 23, 1979. After the presentation of evidence the court heard argument, outside the presence of the jury, on the defendants' motions to dismiss.

On February 1, 1979, the jury found each of the defendants guilty on all four counts of the indictment.

After consideration of the defendants' arguments and briefs and following a review of the applicable case law, it is the opinion of this court that the defendants' motions to dismiss are due to be denied.

The primary contention of the defendants is the DEA's operatives Haas and Conn not only played essential roles in the furtherance of the illegal importation scheme but also received $37,000.00 and $16,000.00, respectively, for their participation in the undertaking. The defendants

argue that such actions at the behest of the DEA and rewards with the agency's blessing constituted outrageous governmental misconduct which violated the due process rights of the defendants and cannot be condoned—thereby warranting dismissal of the indictment against them through the court's supervisory powers.

The Fifth Circuit addressed the defense of governmental misconduct in *United States v. Graves*, 556 F.2d 1319 (5th Cir. 1977). After stating that this defense was a matter of law which was properly a question for the court rather than the jury to consider, *id.* at 1322, the *Graves* court laid down the criteria for evaluating the facts to determine if outrageious governmental misconduct did occur.

In essence, the *Graves* court stated that the creative activity of government agents and informants cannot supply the critical elements and actions necessary for the commission of the crime. *Id.* at 1323-24. Alternatively, "conscience-shocking" outrageous behavior of government agents will also proscribe criminal prosecution in accordence with the rule of *Rochin v. California*, 342 U.S. 165, 72 S. Ct. 205, 96 L.Ed. 183 (1952). *Id.* at 1325.

Measured against these standards, the facts of the present case do not mandate dismissal of the indictment due to governmental misconduct. While Haas and Conn were important actors in the planning and consummation of the marijuana deal, the evidence does not lead this court to believe the nature of their participation was so fundamental and extensive as to warrant dismissal of the charges against the defendants on the ground of outrageous governmental misconduct.

As for the allegedly "exorbitant" sums of money received by Haas and Conn, the Fifth Circuit addressed

this issue in *United States v. Garcia*, 528 F.2d 580 (5th Cir. 1976). In this drug-related case the DEA operative was paid more than $31,000.00 for his services. The defendants attacked the informant's testimony based on the excessive sums he received. The court wrote in permitting such an arrangement:

> "Although the amount of payment involved in this case requires scrutiny and creates doubt as to the propriety of the practice of so heavily subsidizing informants, it does not of itself mandate reversal. In cases involving paid informants . . . we have traditionally looked to corroborating evidence and where, as here, it is clear and convincing, we have affirmed the convictions."

Id. at 587.

This court adheres to the *Garcia* approach and finds after careful review and consideration of the enormous amount of money involved in a plane-load shipment of more than six tons of marijuana from South America, the sums paid Haas and Conn were not so objectionable as to justify dismissal of the indictment.

At the present time, there is a tremendously high level of large scale air and sea operations involving illegal trafficking in marijuana between Colombia, South America, and the United States. It is common knowledge that planes and ships frequently make their way into this country to destinations of deserted airstrips and coastal areas to deliver their cargoes of contraband. During the course of the trial in this case, the national news media reported how widespread this smuggling is, to wit, a *Time* magazine cover-story "The Colombian Connection" and the CBS network program *60 Minutes* presented a similar report.

As with many criminal endeavors, the allure of dope smuggling such as the subject of the present indictment is "big money fast." At trial, testimony was offered that the marijuana seized by federal authorities involved in this case was worth $300.00 per pound wholesale (mass quantities) and $350.00 per pound retail (street value). With more than twelve thousand pounds confiscated in the arrest of the defendants, the "haul" arranged in this case represented an enterprise of approximately four million dollars.

The past docket of this court also bears witness to the quantitative and qualitative extent of the marijuana importation problem. In the last few years, between five and ten prosecutions involving multiple defendants engaged in shipments of large quantities of marijuana from countries to the south of our Nation have been brought upon indictment. Florida and other districts within the federal judicial system, especially within the Fifth Circuit, have seen a precipitous rise in the number of these narcotic smuggling cases.

The defendants cited two recent cases in support of their position, however, they are distinguishable from the present case on their facts. The court in *United States v. Twigg*, 47 U.S. L.W. 2380 (3rd Cir. Nov. 17, 1978) found inexecusably outrageous police "overinvolvement" by means of the government informant providing major components for a drug-manufacturing laboratory. In *United States v. Brown*, 24 Cr.L.W. 2285 (S.D. N.Y. Nov. 29, 1978), the employment of an "absolutely amoral" and unscrupulous informer who received a hefty reward for his work for the Bureau of Alcohol, Tobacco and Firearms, led the court to dismiss the indictment. These two decisions comport with the Fifth Circuit's stance on out-

rageous governmental misconduct as detailed in *Graves*. The compelling elements within the fact situation of *Twigg* and *Brown* are not present in the case before the court.

It is therefore ORDERED, ADJUDGED and DECREED that the defendants' motions to dismiss the indictment because of outrageous government misconduct are due to be, and hereby are, DENIED.

Done, this the 21 day of May, 1979.

/s/ VIRGIL PITTMAN
UNITED STATES
DISTRICT JUDGE

U.S. DISTRICT COURT
SOU. DIST. ALA.
Filed and Entered this the
21st day of May, 1979,
Minute Entry.
No. 49,153
WILLIAM J. O'CONNOR, Clerk
By /s/ G. WALTER
Deputy Clerk